beneficiary (the wife) under the policy in addition to the insured, all the options of the insured under the policy must be treated as exercised by him as trustee or as absolute owner, according as he or the beneficiary ultimately became entitled to the benefit of the policy. Tomlin J. cited with approval a passage from the judgment of Swinfen Eady J. in an earlier case *In re Equitable Life Assurance Society of the United States and Mitchell* [3]:

"So long as any objects of the trust remained unperformed the trusts could not be defeated, and the options must be exercised in the best manner for the benefit of those entitled."

Similarly here too even if the policy had been assigned by the husband to a third person, not the wife, because the statutory trust created by the policy in favour of the wife still remains unperformed the trust cannot be defeated and the policy money cannot form part of the husband's estate.

But the husband and wife here are Muslims and section 25 of the Civil Law Ordinance goes on to provide:—

"Nothing in this part [including section 23] shall affect the disposal of any property according to Muslim law."

Does this disentitle the wife from taking this money beneficially?

I am of the opinion not.

Muslim law rigidly prescribes the share of every heir and no alteration of these shares may be made by will, for a bequest to an heir requires the consent of all co-heirs and a bequest to strangers may not take effect beyond ⅓ of the testator's estate, but there are no restrictions beyond these two limitations. So it is lawful for a Muslim to alter the prescribed shares of his heirs by disposing outright during his lifetime part or the whole of his property to a favoured wife, either directly by way of a gift *inter vivos* or indirectly through trustees. If there is no legal objection to a Muslim altering his heir's share by himself during his lifetime making a gift through trustees to a favoured wife, in my judgment equally there should be no objection in principle to the validity of a similar gift made not by himself but by statute.

Indeed it is quite common for a Muslim to buy land for his minor children and have himself registered in the Land Office records as trustee, though the effect would be to augment the share received by those children in his property after his death. During his lifetime the land is trust property and his death does not alter its character, for thereafter the land remains trust property and his administrator holds it for the purposes of the trust. In my judgment the statutory trust created in favour of the wife in the instant case also retains its character as a trust after his death, and for so long as any object of the trust remains unperformed the trust cannot be defeated and may, if necessary, be enforced by the widow. The beneficial interest in the policy belonged to the wife since the date of the taking out of the policy and no beneficial interest in it accrued or arose on the death of the husband, *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*,[4] and *Westminister Bank Ltd.* v. *Inland Revenue Commissioners*.[5]

I do not think that *In re Ismail bin Rentah*,[6] the case relied on by the guardian *ad litem*, can have any effect on my view because first, that case was a decision on the Co-operative Societies Federated Malay States Enactment No. 7 of 1922 and, secondly, because in the Federated Malay States then there appeared to be nothing corresponding to section 23 of the Civil Law Ordinance, 1956, or at least there was no reference to such a provision in the judgment.

Nor can I accept the guardian's argument that the assignment must be regarded as a will to an heir and therefore void in the absence of consent of the other co-heir, because to do so would be to ignore the clear statutory provisions of the Civil Law Ordinance.

As I base my judgment on these provisions there is no need for me to deal with the case relied on by counsel for the wife, *Sadiq Ali* v. *Zahida Begam* [7]

In the event it is hereby declared that the policy money belongs to the widow beneficially and does not form part of her husband's estate.

Assignment held valid.

Solicitor: *Oo Gin Sun.*

LEE SOCK GOH v. STRAITS CABARET (1953) LTD.

[O.C.J. (Ambrose J.) January 2, 1965]

[Singapore — Suit No. 990 of 1964]

Procedure — Estoppel per rem judicatam — Whether operative to preclude person from claiming benefit of Control of Rent Ordinance — Election — General rule forbidding approbation and reprobation.

On July 5, 1955 the defendants obtained judgment by consent against the plaintiff for recovery of possession of premises which had been damaged by bombs at the end of 1941, and repaired and renovated or rebuilt in 1952 and 1953. On April 24, 1964 they obtained an order for possession and the appeal of the plaintiff against this order was dismissed. The plaintiff instituted proceedings on June 22, 1964 to set aside the consent judgment. To this action the defendants raised the defence of estoppel.

Held: (1) the final judgment of a court of competent jurisdiction is conclusive between the parties on any question put in issue and decided by it and this principle

applies in the case of a judgment by consent and notwithstanding that there has not been a full hearing on the facts;

(2) the court had jurisdiction in the previous action to make an order for possession without further inquiry as the parties agreed that there had been a change of identity as the result of structural alterations;

(3) although the doctrine of estoppel cannot be evoked to over-ride or defeat the statutory obligation of the court to investigate the question whether the premises suffered a change of identity as a result of the structural alterations where the parties do not agree that there has been a change of identity, the plaintiff cannot be allowed in the circumstances of this case to resile from the election made by her in the previous action and to resuscitate a plea which had been abanboned by her.

Cases referred to:—

(1) *Re South American and Mexican Co.* [1895] 1 Ch. 37.

(2) *Kinch* v. *Walcott* [1929] A.C. 482.

(3) *Hoystead* v. *Commissioner of Taxation* [1926] A.C. 155 at p. 170.

(4) *Mitchell* v. *Barnes* [1950] 1 K.B. 448 at p. 451.

(5) *Solle* v. *Butcher* [1950] 1 K.B. 671 at p. 686.

(6) *Jones* v. *Lewis* [1919] 1 K.B. 328 at p. 344.

(7) *Barton* v. *Fincham* [1921] 2 K.B. 291 at p. 299.

(8) *Thorne* v. *Smith* [1947] 1 K.B. 307 at p. 314.

(9) *Middleton* v. *Baldock* [1950] 1 K.B. 657 at p. 661.

(10) *Welch* v. *Nagy* [1950] 1 K.B. 455.

(11) *Griffiths* v. *Davies* [1943] 2 All E.R. 209.

(12) *Stone Lighting Ltd.* v. *Levitt* [1946] 2 All E.R. 653.

(13) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] M.L.J. 49 at p. 55.

CIVIL SUIT.

L. A. J. Smith for the plaintiff.

Goh Heng Leong for the defendants.

Cur. Adv. Vult.

Ambrose J.: This action was instituted on the 22nd June, 1964, for the purpose of setting aside a consent judgment given on the 16th July, 1957, in Suit 1100 of 1955, and re-opening the litigation which was thereby brought to an end.

The previous action concerned the premises known as 99 and 101 Anson Road, Singapore, which were damaged by bombs at the end of 1941, and repaired and renovated or rebuilt in 1952 and 1953. The landlords, Straits Cabaret (1953) Ltd., leased the premises on the 2nd March, 1954, to Lee Sock Goh, a married woman, for a term of ten years, at a monthly rent of $400 for the premises and $600 for the furniture. On the 5th July, 1955, the landlords commenced Suit 1100 of 1955 against the tenant claiming possession of the premises and arrears of rent amounting to $7,042.37. The action came on for hearing on the 21st February, 1957. It was then ordered by consent that these two issues be tried first:

(1) Are the premises subject to the Control of Rent Ordinance?

(2) Was rent in fact in arrears at the date the lease was purported to be forfeited?

The trial proceeded on the 21st and 22nd February, 1957, and was then adjourned. When the trial was resumed on the 16th July, 1957, counsel for the tenant admitted that the premises were new premises and, therefore, not subject to the Control of Rent Ordinance. The action was compromised, and judgment was given in accordance with the agreement between the parties.

The terms of the consent judgment are as follows:—

"This action having come on for hearing before The Honourable Tan Ah Tah, Esq., Puisne Judge, on the 21st and 22nd days of February, 1957, and again on this day, in the presence of counsel for the plaintiffs and for the defendant, and upon hearing the evidence adduced, and upon hearing what was alleged by counsel for the plaintiffs, and upon counsel for the defendant having now signified the consent of the defendant hereto THIS COURT DOTH ORDER AND ADJUDGE that the plaintiffs do recover against the defendant possession of all that the land and premises known as 'The Straits Cabaret' at 99 and 101 Anson Road, Singapore, (being the property comprised in Government Resurvey Lot 147 of Town Subdivision XXIII) AND IT IS ORDERED that the defendant do give the plaintiffs possession of the said land and premises forthwith but provided that during the residue of the term of years created by the lease of the said premises made between the parties hereto and dated the 2nd day of March, 1954, such judgment and order for possession shall not be enforceable unless the rent of the said premises and for the trade and other fixtures and fittings referred to in the said Lease at the rate of $1,000 per month as from the 1st day of August, 1957, has not been paid by the 21st day of any month following upon written demand served on the defendant in accordance with clause 6(c) of the said lease before the 14th day of that month, in which event the plaintiffs are to be at liberty to apply to the Judge for leave to issue execution on this judgment and order AND THE COURT MAKES NO FURTHER ORDER in respect of the relief sought in the statement of claim herein AND MAKES NO ORDER as to the costs of the action or of the said counterclaim AND IT IS LASTLY ORDERED that the parties shall be at liberty to apply."

Under the terms of the consent judgment, the tenant should have vacated the premises on the expiry of the lease, that is, on the 29th February, 1964. But the tenant remained in possession after that date. The landlords accordingly applied to a judge by summons in chambers dated the 9th April, 1964, for an order that the tenant deliver possession of the premises to the landlords forthwith. An order was made as prayed on the 24th April, 1964. The tenant appealed against that order to the Federal Court. And the Federal Court dismissed the appeal on the 15th September, 1964*.

Subsequently, counsel for the tenant applied by motion in the present action for an order restraining the landlords from recovering possession

* See [1965] 1 M.L.J. 98.

of the premises until after the trial of the action. I am now concerned solely with the issue of estoppel raised by the landlords which was tried as a preliminary point of law by consent of the parties at the hearing of the motion.

The submission of counsel for the landlords proceeds as follows. A final judgment by a court of competent jurisdiction is conclusive between the parties on any questions put in issue and decided by it. This principle of estoppel *per rem judicatam* applies to the parties in the case of a judgment by consent: *Re South American & Mexican Co.*,[1] *Kinch* v. *Walcott*.[2] The principle extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision: *Hoystead* v. *Commissioner of Taxation*,[3] at p. 170. The question of fact whether the premises were subject to the Control of Rent Ordinance was put in issue in the previous action. It was admitted by counsel for the tenant in that action that the premises were new premises in the sense that they were new buildings built or completed after the 7th September, 1947, and, therefore, not subject to the Ordinance, by virtue of the definition of "premises" in section 2 of the Ordinance. The admission of counsel for the tenant was fundamental to the consent judgment of the 16th July, 1957. Consequently the tenant was estopped by the consent judgment from pleading, as was pleaded in paragraph 2 of the statement of claim in the present action, that the premises were built and constructed before the 8th September, 1947, and were, therefore, premises subject to the Ordinance.

The first submission of counsel for the tenant is that an estoppel *per rem judicatam* cannot arise unless there has been a full hearing on the facts. In my view there is no substance in this submission. A similar submission was made in *Re South American & Mexican Co.*[1] Vaughan Williams J. disposed of the submission in these words:

> "Under these circumstances I have only to consider, with reference to the second question, Mr. Moulton's suggestion, that a judgment by consent, upon which the court has not exercised its mind, does not and cannot raise an estoppel *inter partes*. I can only say this is the first time I have ever heard such a proposition suggested. It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the State that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end."

The judgment of Vaughan Williams J. was upheld by the Court of Appeal where Lord Herschell L.C. said (at p. 50):

> "The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

It is clear from the above case that, when a judgment is given by consent of the parties, the court gives judicial sanction and coercive authority to what the parties have settled between themselves, and converts a mere agreement into a judgment on which a plea of estoppel *per rem judicatam* may be founded.

The second submission of counsel for the tenant is that the court acted without jurisdiction in giving the consent judgment and that an estoppel could not be founded on such a judgment. It is indisputable that in order that estoppel may arise out of a judgment, the court which pronounced the judgment must have had jurisdiction to do so; and that the lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise: 15 *Halsbury's* Laws of England, 3rd edition, page 204, paragraph 384. It is said by counsel for the tenant that the premises were, admittedly, subject to the Control of Rent Ordinance originally; and that the court had no jurisdiction to make an order for possession without first considering the question of law whether the structural alterations of 1952 and 1953 had produced a change of identity and deciding that a change of identity had resulted and made the premises new buildings built or completed after the 7th September, 1947, and, therefore, no longer subject to the Ordinance.

I will deal first with the contention involved in the second submission, namely, that the question whether there has been a change of identity as the result of structural alterations is a question of law. In my opinion this question is a question of fact. That is the view taken by Denning L.J. in *Mitchell* v. *Barnes*.[4] That is also the view taken by Bucknill L.J. in *Solle* v. *Butcher*.[5] No doubt, in the event of an appeal a question of law would arise for consideration, namely, whether there is any evidence to support the finding of fact that there has been a change of identity. But, in my opinion, that does not change the question of fact before the trial court, namely, whether there has been a change of identity, into a question of law.

In my opinion, even if the question is a question of law or a question of mixed law and fact that would make no difference. The principle of estoppel *per rem judicatam* applies whether the point involved in the earlier decision, and as

to which the parties are estopped, is one of fact, or one of law, or one of mixed law and fact: *Jones* v. *Lewis.*[6] And any issue or question which is taken by the parties as the subject of the litigation, and of the judgment agreed to, is deemed to have been thereby conclusively determined, so as to preclude any subsequent challenge: this view is expressed in *Spencer Bower's* Doctrine of *Res Judicata* at p. 24 and, in my opinion, correctly states the law as regards the application of the principle of estoppel *per rem judicatam* to consent judgments.

In my judgment, the jurisdiction of the court to make an order for possession was not restricted by the Ordinance if there had been a change of identity as the result of structural alterations. It is indisputable that the parties agreed that there had been a change of identity. I take the view that the court, therefore, had jurisdiction to make an order for possession without inquiry. The position is similar to the situation in regard to a landlord's claim for possession of premises which are subject to the Rent Restriction Acts in England, where the court will make an order for possession without further inquiry if the tenant admits that a specific statutory ground on which the landlord claims possession exists and that it is reasonable to make such an order. In *Barton* v. *Fincham,*[7] Atkin L.J. said:

> "If the parties before the court admit that one of the events has happened which give the court jurisdiction, and there is no reason to doubt the *bona fides* of the admission, the court is under no obligation to make further inquiry as to the question of fact;"

Bucknill L.J. said words to the same effect in *Thorne* v. *Smith*: [8]

> "but if the tenant in effect agrees that the landlord has a good claim to an order under the Acts, I think the judge has jurisdiction to make the order for possession under the Acts without further inquiry".

In *Middleton* v. *Baldock,*[9] Evershed M.R. said:

> "If the tenant, sued for possession on some statutory ground, chooses to admit in court, or by some equivalent means, the truth of the allegation on which the landlord's claim is based, then I think it is also established . . . . that the judge can accept the admission as sufficient to found his jurisdiction, and is not bound himself to investigate the matters of fact alleged".

The third submission of counsel for the tenant is that a party cannot set up an estoppel in the face of a statute. It is said that a party cannot be precluded from claiming the benefit of the Rent Restriction Acts by any estoppel. The authority cited for this proposition is *Welch* v. *Nagy.*[10] There the Court of Appeal held that a tenant cannot be estopped from proving the true facts, where those facts attract the protection of the Rent Restriction Acts; and that the rule of estoppel could not oust the jurisdiction of the court to decide whether the letting was within or without the purview of the Acts. Counsel for the tenant also cites *Solle* v. *Butcher.*[5] There the Court of Appeal decided that the doctrine of estoppel cannot be evoked to oust the statutory jurisdiction of the court to decide whether the rent claimed for a dwelling-house infringed the provisions of the Rent Restriction Acts, which preclude the parties from contracting out of their provisions. It is contended by counsel for the tenant that no estoppel *per rem judicatam* can be set up in the face of a statutory obligation to investigate whether there was a change of identity as the result of the structural alterations. Counsel relies on *Griffiths* v. *Davies,*[11] where Lord Greene M.R. said at page 212: "A statutory prohibition or direction cannot be overridden or defeated by a previous judgment between the parties". In that case it was held that a tenant who fails to raise a defence that his rent is in excess of the standard rent permitted by statute, is not estopped from making a subsequent application to determine the rent. Lord Greene's view was approved by Lord Thankerton in *Stone Lighting Ltd.* v. *Levitt.*[12]

The point I have to consider is whether there is a statutory direction or obligation under the Control of Rent Ordinance to investigate the question whether the premises suffered a change of identity as the result of the structural alterations. In the previous action the parties agreed that there had been such a change of identity, and the court, therefore, had jurisdiction to make an order for possession without inquiry for the reason given by me above. In the present action the tenant does not agree that there has been a change of identity. It would seem, therefore, that in the present action the court is bound by the Control of Rent Ordinance to investigate the question whether the premises suffered a change of identity as the result of the structural alterations; and that this statutory obligation cannot be over-ridden or defeated by an estoppel founded on the previous consent judgment. But in spite of this, I think resort may be had in the circumstances of this case to the general rule forbidding approbation and reprobation on the part of a litigant. As was said by Lord Radcliffe in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*: [13]

> "despite the principle that limits estoppels where statutes are infringed, a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but no hold him to his conduct and refuse to start again on the basis that he has abandoned."

It seems to me that in the previous action the tenant acted positively in the face of the court by making an election between fighting out the action to the end and consenting to judgment on

the terms agreed between the parties. By the tenant's election and also by the tenant's admission that the premises had suffered a change of identity, the court was discharged from the duty of investigating the matters in controversy, and the tenant took a benefit under the consent judgment which enabled her to remain in possession until the 29th February, 1964. Having regard to these circumstances and the long delay on the part of the tenant in bringing the present action, I take the view that the tenant cannot now resile from the election made by her and resuscitate a plea which was abandoned by her and re-open the litigation which was intended by both parties to be brought to an end by the consent judgment.

For the above reasons I come to the conclusion that the defendants succeed on the preliminary point raised by them, and I accordingly dismiss the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *L. A. J. Smith; Allen & Gledhill.*

SAY LIP HIN v. SAY LIP HIN

[O.C.J. (Ong J.) January 4, 1965]

[K.L. — Divorce Petition No. 15 of 1964]

Husband and wife — Divorce — Cruelty — Neglect — Fallen out of love — Whether sufficient ground — Divorce Ordinance, 1952, s. 7(2)(d).

The fact that a man has neglected his wife and has fallen out of love for her is not a sufficient ground for her to obtain a decree of dissolution of marriage.

DIVORCE PETITION.

K. L. Devaser for the petitioner.

Respondent absent.

Ong J.: This was an undefended petition by a wife for dissolution of her marriage to the respondent. The petitioner alone gave evidence in support of the petition, which I had no option but to dismiss.

The parties were married in the Registry of Marriages, Malacca, on November 11, 1961. The petition was filed on November 13, 1964. However, in December 1962, the respondent left the matrimonial home in Malacca to take up an appointment in Penang, where the petitioner visited and lived with him in January 1963. If this was tantamount to desertion without cause — which I very much doubt — such desertion nevertheless has not exceeded three years, the minimum period required under section 7(2)(d) of the Divorce Ordinance, 1952.

In paragraph 15 of her petition there was merely a hint of adultery supported by not an iota of evidence.

The petitioner accordingly was left with only one ground for divorce, namely, cruelty. With all the sympathy in the world for her, I am nevertheless compelled to the conclusion that cruelty in the sense in which it is understood in these cases has been far from made out. It is true that the respondent has neglected her, but I am afraid that the fact that a man has fallen out of love for his wife is not a sufficient ground for her to obtain a decree of dissolution of marriage.

The evidence of the petitioner speaks for itself and clearly supports my conclusion. I have nothing more to add.

Petition dismissed.

CHAN FOOK WAH v. BOARD OF ARCHITECTS

[A.C.J. (Winslow J.) January 6, 1965]

[Singapore — Originating Motion No. 22 of 1964]

Architect — Disciplinary proceedings — Infamous conduct in a professional respect — Charge under invalid by-law — Architects Ordinance (Cap. 189), Architects By-laws, 1941, by-law 13.

Administrative Law — Validity of by-law — By-law ultra vires the Ordinance.

This was an appeal against the order of the board of architects cancelling the certificate of registration of the appellant as an architect and removing his name from the register of architects. The offence alleged against the appellant was one under by-law 13(26) of the Architects By-laws, 1941, for signing or putting his signature to plans not prepared by him or by his staff under his supervision for the purpose of obtaining the sanction of the local authorities.

Held: by-law 13 was *ultra vires* the provisions of the Ordinance and was null, void and invalid. The institution of proceedings therefore against the appellant was completely unjustified and the appeal must be allowed.

Case referred to:—

(1) *Re Lee Kian Soo, an Architect* [1953] M.L.J. 195.

ORIGINATING MOTION.

Lim Chor Pee and *Khoo Hin Hiong* for the appellant.

T. H. A. Potts for the respondent.

Cur. Adv. Vult.

Winslow J.: The appellant who is about 67 years of age appeals against the order of the Board of Architects dated 14th October, 1964, cancelling his certificate of registration as an architect and the removal of his name from the register of architects. He was first informed in August, 1963 that he was required to attend a meeting of the board to be held on 3rd September, 1963 "in connection with a court case" relating to one C. H. Wee who had previously been convicted of cheating. Various meetings by the board were held thereafter until October, 1964